

Federal Indian Law

Fundamentals and Some Current Issues

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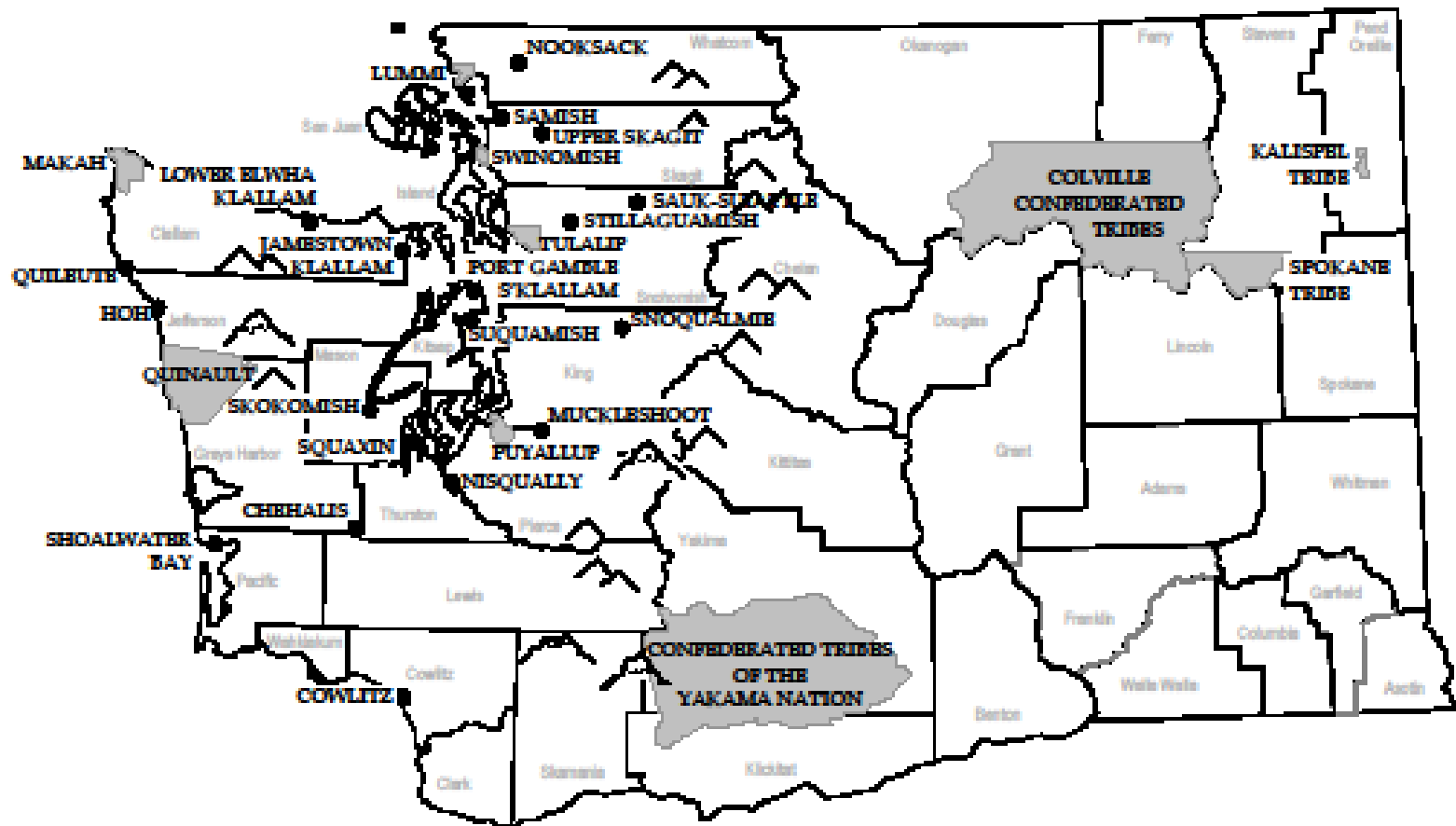
Basic Principles

- Indian tribes are governments with inherent powers
- U.S. Constitution itself does not limit tribal powers – only federal and state powers
- Constitution gives Congress full control over Indian affairs – including authority to limit tribal powers
- Treaty rights are property rights
- State law is generally preempted within Indian country
- Federal government has a trust responsibility to tribes

Who are the tribes and where do they exercise their powers?

- Federal Register list of recognized Indian tribes, 75 Fed. Reg. 60810 (October 1, 2010) (acknowledgment regs at 25 CFR part 83) (566 Tribes as of Jan. 2011).
- Tribal powers exercised within “Indian country.” 18 U.S.C. 1151 (def. includes Indian reservations; allotments; and dependent Indian communities).

FEDERALLY RECOGNIZED TRIBES OF WASHINGTON STATE



Land Ownership in the U.S. - - 2005

- 2.2 Billion Acres Total
- U.S. -- 755 Million Acres
- Indian Tribes -- 46 Million Acres (trust)
- Individual Indians -- 10 Million Acres (trust)
- Alaska Natives – 45 Million Acres

Colonial Period

- Doctrine of Discovery
- Treaties of Peace
- Shifting alliances among tribes and European Nations
- Onset of disease and population pressures – shift in balance of military power
- Proclamation of 1763 precludes land transfers from tribes w/o Crown permission
- Revolutionary War

Articles of Confederation

- Divided Authority Between States and Federal Government
- Created Great Tensions among Tribes, States and Federal Government

U.S. Constitution

- Vested all authority over Indian affairs in Congress and the Executive
- The Congress Shall have Power To . . .
Regulate Commerce with foreign nations,
among the several States, and with the
Indian Tribes. Art. I, § 8, cl.3
- Treaty Power; Supremacy Clause

The Federal-Tribal-State Relationship

Trade and Intercourse Act of 1790

Indian Country Crimes Act (interracial crimes made
Federal offenses) (1816)

Johnson v. McIntosh (1823)

Cherokee Nation v. Georgia (1831)

Worcester v. Georgia (1832)

Long–Standing Rules of Treaty Interpretation

- Treaties are not grants to the Indians but reservations of rights not surrendered.
- Treaties should be interpreted as the Indians would have understood them.
- Ambiguities should be interpreted in the Indians' favor

See United States v. Winans (1905)
Minnesota v. Mille Lacs Band of Ojibwe
(1999).

Tribal Regulation of Non-members on Tribal Land

- *Merrion v. Jicarilla Apache Tribe* (1982)(upholds tribal tax on oil and gas production from the land)
- *Kerr-McGee v. Navajo Tribe* (1985)(tribe need not be organized under the IRA, or have Secretarial approval to impose tax on non-Indian on tribal lands within the reservation)

Tribal Jurisdiction over Members and Non-members

- Tribes have expansive jurisdiction over their own members within Indian country
- *Montana v. U.S.* (1981) tribe may preclude or regulate non-member hunting or fishing on tribal land;
- But tribes held to have limited civil authority over non-members on non-Indian fee land within reservations

The Montana Exceptions

- “A tribe may regulate through taxation, licensing, or other means, the activities of non-members who enter consensual relations with the tribe or its members through commercial dealing, contracts, leases, or other arrangements.”
- When conduct of non-Indians “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

Brendale

- Zoning authority over non-Indian fee land on Yakama Reservation
- No tribal authority on “opened” area; Tribes may zone non-Indian land on “closed” portion

No Majority Opinion

Tribal Court Exhaustion Rule

- Challenges to tribal jurisdiction “arise under” federal common law
- Tribal court remedies must first be exhausted
- Rule applies in diversity cases as well

Strate v. A-1 Contractors (1997)

- Adjudicatory authority is no broader than regulatory authority
- State right of way is the equivalent of fee land
- No tribal court jurisdiction to hear non-member v. non-member suit over car accident

Atkinson Trading Co. v. Shirley

- Navajo Nation hotel bed tax on non-Indian guests on non-Indian fee land is invalid
- Narrow construction of Montana exceptions
- No consensual relationship
- No health, welfare, economy, political integrity exception

Plains Commerce Bank v. Long Family Trust (2008)

- “*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land. *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests.”

Recent Cases

- *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009) (tribal court has jurisdiction to entertain action over non-Indian who damaged tribal land)
- *Phillip Morris USA v. King Mountain Tobacco*, 569 F.3d 932 (9th Cir. 2009) (tribal court lacks jurisdiction over trademark litigation involving off-reservation sales)
- *Water Wheel Camp Recreational Area, Inc. v. Larance*, 2011 WL 2279188, 11 (9th Cir. 2011) (recognizing tribal court jurisdiction over non-Indian on tribal land)

State Civil Authority in Indian Country

- Williams v. Lee (1959) (no state court jurisdiction over on reservation debt collection matter against Indian)
- Warren Trading Post v. Ariz. Tax Comm'n (1965)(gross sales and income tax on non-Indian company foreclosed –applies preemption analysis)
- McClanahan v. Ariz. State Tax Comm'n (1973)(state income tax on tribal member within reservation preempted – inherent sovereignty doctrine (Worcester) provides backdrop

Washington v. Confed. Tribes of Colville Reservation

- Tribal taxation does not oust, or preempt state tax on non-member customers
- Indian Commerce Clause does not oust state tax – it protects from discriminatory state taxes
- State may require tax collection and detailed record keeping

Washington v. Confed. Tribes of Colville Reservation

- Tribal interest in raising revenue is strongest when value is generated on the reservation and the non-member receives tribal services
- State interest prevails since non-Indians receive state services and there is no value generated on the reservation
- Preemption in light of balancing state/federal/tribal interests

White Mountain Apache Tribe v. Bracker (1980)

- State may not tax non-Indian company under contract to harvest tribal timber
- Preemption analysis
- Heavy overlay of federal regulation; no state services; company only used tribal roads
- Value generated on the reservation

California v. Cabazon Band (1987)

- Public Law 280 does not grant states regulatory authority over Indian country
- State law preempted since value was generated on the reservation
- Federal statutes and regulations manifested support for gaming

State Taxation of Non-members

Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997) (Yavapai-Prescott Indian Tribe brought action challenging assessment of business transaction privilege taxes on room rentals and food and beverage sales to non-members of tribe; court of appeals held that Arizona tax was not preempted)

See Cohen (2005) at 706-09 (collecting cases)

Criminal Jurisdiction

Two General Rules

No tribal criminal jurisdiction over non-Indians, *Oliphant v. Suquamish Tribe*

States have jurisdiction on over non-Indian v. non-Indian crime, *U.S. v. McBratney*

Non-PL 280 Criminal Rules

Jamestown S' Klallam; Nooksack

Upper Skagit; Stillaguamish

Sauk-Suiattle; Samish*

Cowlitz*; Snoqualmie

Cook's Landing (in lieu site held to be reservation)

*No Reservations Established At This Time

Criminal Jurisdiction (non-PL 280)

- Federal Major Crimes Act (Indian defendants; enumerated offenses)
- Federal Indian Country Crimes Act (Indian and non-Indian involved as defendant and/or victim; federal criminal code for federal enclaves applies; exceptions for Indian v. Indian crimes)
- Non-Indian v. Non-Indian (State)

Criminal Jurisdiction in Indian Country

	Defendant	
Victim	Indian	Non-Indian
Indian	Tribe: Yes	Tribe: No
	US: Yes, MCA	US: Yes, ICCA
	State: No (unless PL 280)	State: No (unless PL 280)
Non-Indian	Tribe: Yes	Tribe: No
	US: Yes, ICCA, MCA	US: No
	State: No, (unless PL 280)	State: Yes, <i>McBratney</i>

P.L. 280

Congress mandates state civil and criminal jurisdiction in six states in 1953

Other states given option to assume jurisdiction without tribal consent

1968 Amendments

- States may assert jurisdiction only with tribal consent
- Prior assumptions to remain in effect (including Washington)
- States allowed to retrocede jurisdiction to the United States, but no role for tribes

WA Statute

- The state of Washington assumes criminal and civil jurisdiction over Indians and Indian territory:
- But this does not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation, except in 8 subject matter areas:

No Civil Regulatory Jurisdiction

- *Bryan v. Itasca County* (PL 280 does not provide states with taxing authority; it simply opens state courthouse door to resolve private civil disputes)
- *California v. Cabazon Band* (merely attaching criminal penalties to civil regulations does not make them enforceable as within PL 280s grant of criminal jurisdiction)

Example

- Because Washington asserted jurisdiction over operation of motor vehicles on public roads, state courts may entertain personal injury lawsuits arising within reservations on tribal roads. *McRea v. Denison*.
- Washington may not enforce civil regulatory rules such as speeding regulations against Indians because they are an exercise of regulatory power. *Confederated Tribes of Colville Reservation v. State*.

State Criminal Jurisdiction in Indian Country Washington PL 280 (partial)

Defendant

Indian

Non-Indian

State has jurisdiction over Indians on all Indian country outside of reservation boundaries

State has jurisdiction over non-Indian defendants on all land within Indian country

State has no jurisdiction over Indians on tribal trust or allotted lands within reservation boundaries, except for:

1. Compulsory school attendance;
2. Public assistance;
3. Domestic relations;
4. Mental illness;
5. Juvenile delinquency;
6. Adoption proceedings;
7. Dependent children; and
8. Operation of motor vehicles upon the public streets, alleys, roads and highways

Full P.L. 280 Reservations

- Tribe Subject to Full State Civil Adjudicatory and Criminal over all of Indian Country.
 - ✓ Muckleshoot Tribe
 - ✓ Squaxin Island Tribe
 - ✓ Nisqually Tribe
 - ✓ Skokomish Tribe

Partial P.L. 280 Reservations

Puyallup Tribe; Quileute Tribe Quinault Nation;
Shoalwater Bay Tribe; Spokane Tribe

Suquamish Tribe; Swinomish Tribe; Tulalip Tribes;
Chehalis Tribe

Colville Tribe; Yakama Nation; Hoh Tribe; Kalispel
Tribe

Lower Elwha Klallam Tribe; Lummi Nation; Makah
Nation

Port Gamble S' Klallam Tribe

Retrocession

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to [P.L. 280].

25 U.S.C. § 1323.

Presidential Proclamation Delegating Authority to Secretary of the Interior

United States may accept retrocession of jurisdiction upon publication of acceptance in federal register.

“Provided, That acceptance [by the Secretary of the Interior] of such retrocession [by a state] of criminal jurisdiction shall be effected only after consultation by the Secretary with the Attorney General.”

33 Fed. Reg. 17339 (1968) (LYNDON B. JOHNSON)

WA Retrocession

- It is the intent of the legislature to authorize a procedure for the retrocession, to the Quileute Tribe, Chehalis Tribe, Swinomish Tribe, Skokomish Tribe, Muckleshoot Tribe, Tulalip Tribes, and the Colville Confederated Tribes of Washington and the United States, of criminal jurisdiction over Indians for acts occurring on tribal lands or allotted lands

- [Upon request of enumerated tribes] the governor may, within ninety days, issue a proclamation retroceding to the United States the criminal jurisdiction previously acquired by the state over such reservation. However, the state of Washington shall retain jurisdiction as provided in RCW [37.12.010](#).

Resources

- Cohen's Handbook of Federal Indian Law (2005 ed. & 2009 Supp.)
- Anderson, et al., American Indian Law: Cases and Commentary (2d Ed. 2010)
- Canby, American Indian Law in a Nutshell (5th ed. 2009)